

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ALLAH JUSTICE,

Plaintiff(s),

**REPORT AND
RECOMMENDATION**

-against-

CV 08-3918(JS) (WDW)

CORPORAL GLENN MCGOVERN,

Defendant(s).

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WILLIAM D. WALL, United States Magistrate Judge:

For the reasons set forth herein, the undersigned recommends that this action be dismissed pursuant to Federal Rule 41 for failure to prosecute.

On June 1, 2009, the undersigned scheduled a telephone conference for July 16, 2009, and mailed a copy of the order to the pro se plaintiff at his address of record, 36 W. Clinton Avenue, Roosevelt, New York 11575.¹ The mailed order was not returned as undeliverable. On that date, defense counsel tried to reach the plaintiff at the telephone number of record, but reported to the court that he was not there, and that they were told by the person who answered the phone that they did not know how to contact Mr. Justice. Based on the plaintiff's failure to appear, on July 23, 2009, I issued an Order to Show Cause, scheduling a hearing at which the plaintiff must show cause why I should not recommend dismissal. A copy of the order was mailed to the plaintiff at his address of record and was not returned to the court. The hearing was scheduled for and was held on August 13, 2009. Once again, the plaintiff did not appear. *See*

¹The Order was captioned as an "Incarcerated Pro Se Plaintiff Initial Conference Order," which inaccurately reflected the plaintiff's status at that time. Although he was incarcerated when the action was filed, he filed a change of address with the court on 1/28/09, reporting the Clinton Avenue address. The order was sent to the Clinton Avenue address and was not returned. The plaintiff did not complain to the court about the inaccuracy, which did not affect the scheduling of the conference, nor was he available at the time of the conference.

DE[25].

The court now recommends dismissal based on the plaintiff's failure to prosecute and to apprise the court of his current contact information. *See* Fed. R. Civ. P. 41(b). Rule 41(b) gives the district court power to dismiss a complaint "for failure to comply with a court order, treating noncompliance as a failure to prosecute." *Simmons v. Abruzzo*, 49 F.3d 83, 87 (2d Cir. 1995). It is well settled that a dismissal under Rule 41(b) "operates as an adjudication on the merits and that such a dismissal is with prejudice." *Hoffman v. Wisner Classic Mfg. Co.*, 927 F. Supp. 67, 71 (E.D.N.Y. 1996) (citing *Link v. Wabash R. Co.*, 370 U.S. 626, 630-32 (1962)). Here, the plaintiff has failed to prosecute the case and failed to comply with my orders of July 16 & 23, 2009.

He also has failed to inform the court of his contact information, although he clearly knows how to do so, having informed the court in January 2009 of a change of address. It is the plaintiff's responsibility to keep the court informed of his current address. *See Harrell v. Hess*, 2008 WL 1869292 (E.D.N.Y. Apr. 25, 2008) and cases cited therein. *See also Dong v. United States*, WL 385117, at*3 (S.D.N.Y. Mar. 2, 2004) (dismissing pro se plaintiff's claim when plaintiff failed to inform court of his current address, causing court to lose contact with him).

For these reasons, I recommend dismissal of this action with prejudice.

OBJECTIONS

A copy of the Report and Recommendation is being sent by the Court to all parties. Any objections to this Report and Recommendation must be filed with the Clerk of the Court with a courtesy copy to the undersigned within 10 days of service. Failure to file objections within this period waives the right to appeal the District Court's Order. *See* 28 U.S.C. §636 (b) (1); Fed. R. Civ. P. 72; *Beverly v. Walker*, 118 F.3d 900, 902 (2d Cir. 1997); *Savoie v. Merchants Bank*, 84

F.3d 52, 60 (2d Cir. 1996).

Dated: Central Islip, New York
August 21, 2009

/s/ William D. Wall
William D. Wall
United States Magistrate Judge